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January 28, 1998

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Chairman William Kennard
Commissioner Susan Ness
Commissioner Harold Furchtgott-Roth
Commissioner Michael Powell
Commissioner Gloria Tristani
Ms. Kathleen O'Brien Ham, Chief, Auctions and Industry Analysis Division
Mr. Daniel Phythyon, Chief, Wireless Telecommunications Bureau
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

RE: Auction # 17 - Local Multipoint Distribution Service (LMDS)

Greetings and Salutations,

PathOne takes this opportunity to "step forth" and address the Federal Communications Commission with the attached Ex Parte Presentation and Request for Consideration and Action regarding Auction #17 - LMDS.

As the Auction is at hand, PathOne graciously asks the FCC to consider this matter in the utmost urgency.

As a "very small business" in the LMDS marketplace, and unfamiliar with certain manners and processes used to appropriately approach the FCC, PathOne also humbly asks the FCC to overlook the "irregularities" that may be found in the attached effort.

Thank you very much.

Very truly yours,

Richard Newcomb
President and CEO

cc: Honorable Senator Orrin Hatch
Honorable Senator Robert Bennett
Honorable Senator John McCain

"LMDS is the future of telecommunications"

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Presented by
PathOne Communications Corporation
P.O. Box 71085, Salt Lake City, UT 84171-0085

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)

)
Rescheduling of LMDS)
Auction until February 18, 1998)

DA# 97-2352 ,
Report No. Auc-97-17-C ,
CC Docket # 92-297

Ex Parte Presentation and subsequent petition for Consideration of Delay of Auction #17-LMDS

(Two copies provided to the Commission's Secretary for admission into the public record)

PathOne Communications Corporation
Ex Parte Presentation and Request for Consideration and Action to delay Auction #17 - LMDS
January 26, 1998

Greetings and Salutations,
Chairman Kennard, Commissioners, Ms. Ham, Chief - Auctions Division, Mr. Phythyon, Chief - Wireless Bureau:

PathOne addresses the Federal Communications Commission (FCC) with regard to upcoming spectrum Auction #17 - LMDS, currently scheduled for February 18, 1998.

PathOne provides the FCC this Ex Parte Presentation and Request for Consideration of and Action to Delay Auction #17. PathOne intends to provide the FCC with information and rationale which demonstrates positive basis and benefit for which the Commission should delay Auction #17 for a period suggested to be 90 days.

Background

PathOne is an intended participant in Auction #17. PathOne is also considered a "very small business" and a "designated entity" with regard to Auction #17. Classified as such, PathOne has been very acutely aware of action by the Commission with regard to these classifications. PathOne finds the "actions in summary and as a whole" by the FCC regarding spectrum auction for LMDS inconsistent with the apparent "intent and spirit" of the Telecommunications Act of 1996, thereby creating "market entry barriers" and subsequent hardship to small businesses interested in competing in the domestic telecommunications markets.

Ex Parte Statements

PathOne finds that several items of action by the FCC do not "in summary together" support, promote, and follow the "spirit" and/or the "intent" of the Telecommunications Act of 1996. Each of the following Ex Parte sections will attempt to demonstrate these findings separately and specifically. Following these sections, PathOne will attempt to demonstrate how these actions, "in summary and as a whole", do not provide the "positive" outcome upon the Act, as required of the FCC. Further, PathOne will demonstrate the beneficial effects a delay of 90 days upon the LMDS auction will indeed support the "spirit and intent" of the Act and the positive aspect of competition in the LMDS market.

Statement 1 - WTO Basic Telecom Agreements

The recent World Trade Organization Agreements address a broad scope of international trade opportunities. Among the WTO Agreements are sections regarding opportunities for increased foreign investment, beyond the "customary" 25% seen in other spectrum markets. However, as announced by the FCC International Bureau in NRIN 8001, these WTO Agreement benefits will not go into effect until February 5, 1998. This does not provide interested foreign investors from within WTO member countries the permission nor opportunity to invest in U.S. LMDS activities. This limitation eliminates potential healthy competition in the local loop market, as well as other telecommunications market, that LMDS activities would enable.

This "unavailability" to foreign investment capital, compounded by the well documented and clear difficulty of obtaining domestic investment capital (comments in paragraph 12, FCC 96-216 and knowledge of current market conditions through feedback to OCBO), is creating rather than eliminating "market entry barriers" for small business. PathOne does not feel the FCC has acted deliberately to create this difficult situation. PathOne does feel the FCC has authority, incentive, and ability to avoid contentious situations surrounding this issue via a delay of Auction #17. This suggested delay would enable small business participants in LMDS which have interested foreign investors the opportunity to complete lengthy and complex capitalization contracts. This opportunity is not available under the current Auction #17 schedule as suggested in Public Notice Report # AUC-97-17-C.

PathOne Communications Corporation

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Statement 2 - Section 257 of the Act

Section 257 of the Telecommunications Act of 1996 (Act) seems to clearly direct the FCC to "...identify and eliminate market entry barriers...." with regard to small business involvement in domestic U. S. telecommunications markets. A specific item clearly identified at the time of the Act was the uniquely difficult situation small business experienced obtaining capitalization to participate and thereby provide competition in various telecommunications markets. This particular difficulty continues to exist, and has grown even more acute in recent months. Currently, PathOne finds no evidence that items to "eliminate market entry barriers" exist. Section 714 of the Act and FCC 96-216 address effort by the FCC to utilize various monetary tools to "...eliminate market entry barriers..". Higher bidding credits do not address the "market entry barriers". Instead, PathOne finds the positive intent of the higher bidding credits as a potentially abused loophole by which "major" telecom organizations will be able to gain unintended advantage in the LMDS auction. This "favorable" situation is seen by PathOne as the perceived creation of 20% or less owned small businesses by the "majors" to enjoy the higher bidding credits. This would suggest spectrum auction outcomes that would apparently be opposite of the "intent and spirit" of the Act.

Statement 3 - Installment Payment Program

Eliminating the Installment Payment Plan (Ref.: WT 97-35) in favor of the greater bidding credits does not "...eliminate market entry barriers...." as set forth in Section 257 of the Act. If small business is capable of becoming capitalized, the credits would be beneficial. However, the installment payment program specifically eliminates market entry barriers. Cook Inlet's argument seems clearly limiting and self-serving to those organizations that are easily capitalized (Ref. Par. 8, 2nd Order on Reconsideration. CC Docket #92-297, Sept. 7, 1997). Additionally, it seems to become apparent that many of the large carriers and corporations are using 20% or less owned "subsidiaries" to gain favor as small business in the LMDS auction. Therefore, the elimination of the installment payment program in favor of the greater bidding credits has created market entry barriers to small business and at the same time provides an inadvertent, but seemingly favorable position, to the major telecom organizations.

Statement 4 - Inconsistent application of the Installment Payment Program

In Report WT 97-35, the FCC eliminated the Installment Payment Program for Auction #17-LMDS. It appears that this was a result of the largely chaotic and negative outcome of the PCS "C" Block auction. A re-auction of said spectrum is set for September 1998. Even in the face of such chaos, the FCC is still allowing an Installment Payment Program for the PCS September re-auction (Ref. WT Docket #97-82). This clearly appears to be an inconsistent and capricious application of certain aspects of the bidding rules made by the FCC.

Statement 5 - Section 271 of the Act (Local Loop Competition)

LMDS seems to be viewed, by design, as the wireless competitive, local loop alternative to current wired infrastructures. Current market entry barriers of insufficient capital preclude small business participation on a broad scale, thereby diminishing the new participation and competition from small business, as is the "intent and spirit" of the Act.

Statement 6 - Actions "in summary and as a whole" upon small business participation in Auction 17-LMDS

As commented in FCC 97-232, Commission Report to Congress, dated July 2, 1997, Section E, paragraph 3 explains how auction spectrum has benefited small business, as well as women-owned and minority-owned businesses. Not as obvious, but just as important, is the fact that these auctions were inclusive of Installment Payment Programs which directly "eliminate market entry barriers." Bidding credits are of little benefit if "market entry barriers" such as poor domestic investment abounds.

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LMDS can be the most competitive technology to the local loop environment. Insufficient domestic investment activity with small business participants, as well as unavailability to recent benefits of the WTO agreements, will inhibit and discourage small business, as well as women-owned and minority-owned businesses.

The recent delay of Auction #17 from December 1997 to February 18, 1998 was explained as an opportunity for businesses to gain additional capitalization. However, the recent holidays of Christmas and New Years have diverted much attention away from capitalization of LMDS ventures. Therefore it is PathOne's view that the latest delay, although well meant by the Commission, was "upstaged" and functionally negated by the holidays.

Therefore and overall, PathOne feels that the FCC clearly recognizes the investment difficulty experienced by small business as shown in the LMDS auction delay of Dec. 1998. Further, the actions of the FCC, "in summary and as a whole," in the matter of Auction #17, seem not to effect the best overall outcome of the "intent and spirit" of the Telecom Act of 1996.

As a result of these apparent situations, PathOne requests Consideration and Action by the FCC to delay Auction #17-LMDS for a period of 90 days. PathOne feels this delay would result in the positive "intent and spirit" of the Telecommunications Act of 1996 by providing small business with the opportunity to utilize both foreign and domestic investment monies to create very competitive telecommunications markets. PathOne also feels that delay would minimize the potential liability that might occur surrounding WTO Agreement issues. Additionally, a delay of Auction #17 avoids the potential reconsideration of Section 714 issues, namely the Installment Payment Program.

In conclusion, LMDS is viewed as a considerable competitive potential in the local loop (as well as other telecom) market. A significant positive potential of this magnitude should have careful and positive stewardship by the FCC. This style of conduct could be viewed as the Commissions equitable attempt to institute the "spirit and intent" of the Telecom Act of 1996. A delay of Auction #17 can be an example of that conduct.

Thank you. I am grateful for your review and consideration of this presentation.

Very Truly Yours,

Richard Newcomb
President and CEO
PathOne Communications Corp.